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Supreme Court of the United States

OCTOBER TERM, 1958

No. 410

ST. LOUIS AMUSEMENT COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, COLUMBIA BROADCASTING SYSTEM, INC., KWK, INCORPORATED, 220 TELEVISION, INC., BROADCAST HOUSE, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR RESPONDENT COLUMBIA BROADCASTING SYSTEM, INC. IN OPPOSITION

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Opinion Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit was filed on August 28, 1958, and is printed in the Appendix to the petition. It has not been officially reported.

Jurisdiction

This Court has jurisdiction to review the order below under 28 U. S. C. § 1254(1).

Question Presented

Whether petitioner had standing to appeal to the Court of Appeals, under Section 402(b) of the Communications Act of 1934 as amended, from the action of the Federal Communications Commission consenting to the transfer of a construction permit for a television station when its claim to standing rested solely on the fact that it had once been an applicant for such construction permit but petitioner had defaulted in a comparative proceeding and had taken no appeal from the order granting the permit.

Statutes and Regulations Involved

Statutes:

The petition purports to set forth the text of Section 309(c) of the Communications Act of 1934, under which petitioner claimed standing to protest the Commission's action. The text quoted, however, is that of the statute as it read before it was amended by the Act of January 20, 1956 (70 Stat. 3). The text of the section, as it read at all times material to this proceeding, and as it now reads, is set forth in the Appendix hereto.

The petition correctly sets forth the text of Section 310(b) of the Communications Act, under which the Commission acted in consenting to the transfer of the construction permit.

Petitioner's claim that it had standing to appeal to the Court below rests on Section 402(b) of the Communications Act. The text of that section is set forth in the Appendix hereto.

Rules and regulations of the Federal Communications Commission:

The petition sets forth the present text of Section 3.636 of the Commission's Rules, relating to multiple ownership of television stations. The material facts regarding the amendment of the Rule during the course of the proceeding are shown in the record and summarized below.

Statement

Five applications for a construction permit for Channel 11 in St. Louis were designated by the Commission for a comparative hearing (R. 442-443, 859-861). The applicants were (1) St. Louis Telecast, Inc., (2) the present petitioner St. Louis Amusement Company, (3) respondent Columbia Broadcasting System, Inc. (herein called "CBS"), (4) 220 Television, Inc. and (5) Broadcast House, Inc.

The CBS application, when filed, was consistent with Section 3.636 of the Commission's Rules, which prohibited any person from holding a majority interest in more than five television stations. On November 25, 1953, before the applications were designated for hearing, the Commission amended its Rule to prohibit any person from holding an interest in excess of one percent in more than five stations (18 F. R. 7799-7800). In promulgating the amendment, the Commission stated that a procedural waiver of the new Rule would be granted to those who had applications pending which were not defective under the prior Rule, but which would otherwise have become defective because of their minority interests; any applicant for such waiver would, upon receiving a sixth interest, be required to divest itself of one of its other holdings (R. 7004). CBS, which held certain minority interests in stations, applied for such a procedural waiver so that it would be "allowed to remain in this proceeding as one of the competing applicants"

(R. 7003-7006). The Commission granted a waiver on April 14, 1954 over the opposition of two of the other applicants, but not petitioner (R. 867A-867C).

On May 26, 1954, petitioner filed a motion to dismiss the CBS application solely on the ground that the grant of Channel 11 to CBS would violate the revised Rule (R. 7224). The Commission denied that motion on the authority of its previous decision granting a procedural waiver to CBS (R. 941, 867A-867C). Petitioner sought to review that order in the Court of Appeals for the District of Columbia, and on August 11, 1954 its petition was dismissed by that Court on the ground that the Commission's order was interlocutory and not reviewable (Case No. 13,354). Petitioner filed a petition in this Court for a writ of certiorari which was denied on November 8, 1954 (348 U. S. 876).

The comparative hearing on Channel 11 commenced on August 20, 1954. At the opening session petitioner moved for a postponement pending the filing of its petition for certiorari and a ruling by this Court (Tr. 895-898). When the Hearing Examiner denied that motion, counsel for petitioner stated it would not participate further in the proceeding so long as CBS remained a party (Tr. 898-908). The Examiner then held petitioner in default (Tr. 908). On August 23, 1954, petitioner appealed to the Commission from the Examiner's refusal to postpone the hearing, but not from the default ruling (R. 995). On November 4, 1954, the Commission sustained the Examiner (R. 995-996).

Petitioner took no further part in any of the Channel 11 proceedings, and the remaining four applicants proceeded with the comparative hearing. Hearings were held before the Examiner from August 20 to September 24, 1954, and the record was finally closed on February 23, 1955 (Tr. 893-4223, 4473, R. 1138). Unlike the other appli-

cants, petitioner did not submit any evidence or proposed findings to the Examiner, did not file exceptions to the Examiner's Initial Decision, and did not participate in oral argument before the Commission (R. 12213).

On September 6, 1955, the Examiner released his Initial Decision (R. 7756-7868) proposing a grant to CBS. Oral argument was held before the Commission on July 9, 1956. On March 27, 1957, the Commission, upholding the Examiner, granted the application of CBS and denied the other applications, including that of petitioner, which it found to be in default (R. 8067-8195). Petitioner did not petition for reconsideration or appeal from that final action. Each of the other losing applicants filed timely appeals and briefs in the Court of Appeals.

While the appeals from the Channel 11 grant to CBS were pending in the Court below, KWK, Inc., a CBS affiliate which was operating a station on Channel 4 in St. Louis, approached CBS with an offer to sell its television assets and assign its license to CBS (R. 12033). CBS decided to accept the offer because it would permit continuity of CBS network programs on the channel which had been carrying them and would permit CBS to commence operation in St. Louis at an earlier date than would have been possible if it were required to complete construction of a new station on Channel 11 (R. 12033). Under Section 3.636(a)(1) of the Commission's Rules, CBS could not acquire the Channel 4 station unless it disposed of its Channel 11 interest; and it was unwilling to make the Channel 4 purchase unless it could be assured of retaining its Channel 11 grant in the event that for any reason the Channel 4 transfer was not consummated.

On September 25, 1957, CBS and KWK, Inc. entered into a contract for the assignment of KWK, Inc.'s license and facilities for approximately $2,440,000 (R. 11792, 11800-11832). On the same day, CBS also entered into

a contract to assign to 220 Television, Inc. the Channel 11 construction permit, conditioned upon final Commission consent to the Channel 4 assignment and upon the dismissal of all Court appeals from the Channel 11 grant (R. 12044-12063). In anticipation of that agreement, 220 Television, Inc. had, on September 20, 1957, entered into an agreement with the other losing applicants for Channel 11, St. Louis Telecast, Inc. and Broadcast House, Inc., which provided for dismissal of the appeals and issuance to each of the two latter companies of $200,000 in debentures of 220 Television, Inc. (R. 12085-12089).

The appeals from the Channel 11 grant were dismissed on September 26, 1957 (R. 12207). After the Channel 11 grant had thus become final and non-reviewable, applications were filed with the Commission for approval of the assignments. No opposition to the applications was filed and they were granted without hearing on October 23, 1957, the Channel 4 assignment being conditioned that it not be consummated until CBS had disposed of its Channel 11 interest (R. 12175).

On October 30, 1957, petitioner filed with the Commission a "protest and petition" in which it asked that the Commission reconsider its consent to the assignments, designate the applications for rehearing, revoke the Channel 11 construction permit and receive applications for a construction permit for Channel 11 (R. 12177-12183). That "protest and petition" was dismissed by a Memorandum Opinion and Order of the Commission released December 2, 1957 in which it was held that petitioner was not a "party in interest" entitled to protest the assignments under Section 309(c) of the Act or a person "aggrieved or whose interests are adversely affected" who might petition for reconsideration under Section 405 of the Act (R. 12213). The Commission there stated:

> "Amusement's status is that of an 'ex-applicant' for Channel 11 who, after being declared in

> default by the Examiner, never appealed this determination, or took any further action by way of proposed findings, exceptions, oral argument, petition for rehearing, or appeal to protect or advance its lost interest in Channel 11." (R. 12213).

Notwithstanding its finding as to standing, the Commission on its own motion considered petitioner's principal allegations with respect to the merits of the assignments (R. 12213-12214). The Commission stated that it had found both CBS and 220 Television, Inc. to be qualified as St. Louis station licensees in the Channel 11 proceeding and had reaffirmed this finding in approving the assignment applications (R. 12214), that it had no right under Section 310(b) to consider whether petitioner might be an even better assignee than 220 Television, Inc. and that there was no showing that its action on the assignment applications was in any respect improper or contrary to the public interest (R. 12214-12215).

Petitioner appealed to the Court below from the order of the Commission dismissing its "protest and petition". The Court's decision is expressed in the sentence of its opinion which immediately followed the statement of facts. It wrote:

> "We agree with the Commission that appellant had no standing to protest and has no standing on appeal and the appeal is therefore dismissed."

The Court then wrote two paragraphs in which it referred to the Commission's argument that under Section 310(b), as amended in 1952, the Commission has no power to consider the comparative qualifications of others, but must decide only whether the proposed assignee of the permit is qualified. The Court expressed the view that "if this interpretation is correct, there may be a serious gap in the statutory scheme to which Congressional attention should

be directed." The only point which the Court decided, however, was that petitioner had no standing to appeal.

Argument

The issue in this case is extremely narrow. It is simply whether petitioner, on the facts of this unique situation, had standing to protest the Commission's action and standing to appeal to the Court below. None of petitioner's efforts to clothe the case with large public interest considerations can broaden that issue or magnify it into one warranting review on certiorari. The claim that the Court below misconstrued Section 310(b) "to exclude consideration of the public interest, convenience and necessity in transfer cases" (petition, p. 11) is groundless. That Court did not construe the statute. It referred to an argument made by the Commission and expressed its view as to what power the Commission should have, "if it does not under the existing statute". If the decision below were to be reviewed, the point urged by petitioner regarding the effect of Section 310(b) would not be reached.

The sole point that was decided, moreover, presents no issue of general application. The question of standing is necessarily one of fact in each case, and the facts here are unique. Furthermore, that question was decided in a manner which is obviously correct. Petitioner's own statement of the grounds on which it claims interest shows that it does not have that direct tangible interest in the subject matter which, under all the decisions, is required to make it a "party in interest" or a person "who is aggrieved or whose interests are adversely affected by" the Commission's action.

Petitioner suggests that review by this Court would be desirable in order to give guidance to Congress in the framing of new legislation. This suggestion is followed

by reference to testimony before a Congressional investigating committee, given after the case was argued below, regarding conversations with members of the Commission prior to the original grant. CBS has answered the same charges, made by the present petitioner, in proceedings now pending before the Commission. In any event, the matters to which petitioner refers are patently outside the issues in this case.

The ground on which certiorari is sought is that the case presents an important question of law as to the role of the Commission in transfer cases under Section 310(b) of the Communications Act. That issue, however, is not in the case and would not be reached if the decision below were to be reviewed. The only issue that was decided below, and the only one that would be presented here, is whether petitioner was a "party in interest" with standing to protest under Section 309(c) and, accordingly, a person "who is aggrieved or whose interests are adversely affected by" the Commission's action who may appeal under Section 402(b)(6).

Petitioner asserts that the Court below sanctioned action by the Commission which excluded consideration of the public interest, convenience and necessity in transfer cases under Section 310(b). The opinion shows, in language that cannot possibly be mistaken, that the Court decided no question whatever under that Section. After expressing its conclusion that the appeal must be dismissed for lack of standing, the Court proceeded to express its views regarding the implications of an argument made by the Commission which, the Court thought, unduly limited its powers. That the Court was not passing upon the argument is shown most clearly by its statement that the Com-

mission ought to have power to inquire into transactions between transferor and transferee "if it does not under the existing statute". It is further shown by the Court's statement that "there may be a serious gap in the statutory scheme to which Congressional attention should be directed". All of this, of course, is *dictum*. None of it can possibly create any issue for review by this Court as to the scope of the Commission's powers under Section 310(b).

Petitioner's effort to show that the case presents a substantial question under Section 310(b) leads it to assertions regarding the action of the Court below which the opinion shows to be wholly without foundation. Petitioner states (p. 11):

> "The Court of Appeals decided . . . that the Communications Act allows the grantee of a permit to transfer it to whom he pleases; and that the Commission may consider only whether a transferee is 'qualified'."

The Court of Appeals made no such "decision"; it dismissed petitioner's appeal.

Again (at p. 13), the petition states that:

> "The contention of the Commission, affirmed by the Court of Appeals, that the legislative history of Section 310(b) shows a requirement for exclusion of consideration of the public interest in passing on transfers, is not correct."

No such contention was made by the Commission, and the Court below "affirmed" no contention of the Commission whatsoever concerning its construction of Section 310(b).

Even if the decision below on petitioner's standing to appeal were erroneous, the propriety of the Commission's approval of the transfers would not have been open to review in that Court. If the Court had found that petitioner's protest had been improperly dismissed, it would have been

required to remand for further proceedings before the Commission under Section 309(e). In cases where the Court of Appeals has held that protests were improperly dismissed by the Commission, it has refused to consider the merits of the issues raised until they have first been passed upon by the Commission on remand. *Camden Radio, Inc.* v. *Federal Communications Commission*, 220 F. 2d 191; *Greenville Television Co.* v. *Federal Communications Commission*, 221 F. 2d 870. In the *Camden* case, the Court pointed out that the protestant whose standing it had upheld might get administrative relief, and that "it would be improper for us to review that order on the present incomplete record, which probably will soon be substantially supplemented." 220 F. 2d at 195. It follows *a fortiori* that if this Court were to conclude that petitioner's appeal should have been entertained, it would not proceed to pass on the substantive question on which the Court below had made no determination. The present petition cannot bring before this Court the issue as to the proper function of the Commission in transfer cases, to which the bulk of petitioner's argument is addressed.

II.

On the only issue that is here presented, petitioner does not even claim that there is an important question of general application or that any of the considerations guiding this Court's discretion in granting review on certiorari are applicable. On the contrary, after citing a number of the cases on standing decided in the Court of Appeals, the petition asserts (p. 24) that each case "has been decided on its own facts" and affords "little guidance for future cases".

Patently, the facts in this case are unique. The only question decided below was that, in this unique situation, petitioner had no standing to appeal. No question of general application is presented. And on the question which

was decided, the present petition shows beyond question that the decision is plainly right.

A protest under Section 309(c) of the Communications Act may be filed by a "party in interest". To petition for rehearing under Section 405, one must be a party to the proceeding or a "person aggrieved or whose interests are adversely affected thereby". The two quoted phrases are synonymous. *Camden Radio, Inc. v. Federal Communications Commission*, 220 F. 2d 191; *Metropolitan Television Co. v. Federal Communications Commission*, 224 F. 2d 879. The latter phrase is employed in Section 402(b)(6) on which petitioner necessarily based its right to appeal. Accordingly, if the Commission properly dismissed petitioner's protest for lack of standing, the decision below was right. *Granik & Cook v. Federal Communications Commission*, 252 F. 2d 822; *Southwestern Publishing Co. v. Federal Communications Commission*, 243 F. 2d 829.

Whatever factual variations may be found in the cases, it is plain that the phrases "party in interest" and "person aggrieved or whose interests are adversely affected" require a showing of some special interest which distinguishes the protestant or petitioner from other members of the public. Petitioner's own statement of its alleged grievance shows that the decision below can be considered erroneous only by disregarding that requirement entirely. The allegations of the "protest and petition" are summarized, in slightly varying ways, at three points in the petition (pp. 10, 17, 23). At each point, it is made plain that the only factor distinguishing petitioner from anyone else who would like to apply for a television channel in St. Louis is that it was at one time an applicant for Channel 11. Thus petitioner asserts (p. 17) that it had been a qualified applicant; that the grant to CBS was unlawful and was under attack in

the Court of Appeals; that the dismissal of the appeals, as part of the transfer transactions, prevented a determination on the subject; that the Court "might have decided that the grant was invalid", in which event the case would have been returned to the Commission for the selection of a new grantee; and that "the effect of this would have been to enable petitioner" to participate in the proceedings.

On this statement, it is plain that petitioner failed to show that it had a grievance which was "something more than nominal or highly speculative". *National Broadcasting Co. (KOA)* v. *Federal Communications Commission*, 132 F. 2d 545, 548, aff'd 319 U. S. 239. See also *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470. Moreover, the contention rests on a basic legal fallacy. Under Section 402(h) of the Act, the Commission would after remand be required to carry out the judgment of the Court, "and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined". On the proceedings already had, petitioner's default barred it from further participation. No grant could possibly have been made to petitioner on the basis of the record already made, since it contained no evidence in support of petitioner's application.

Petitioner's claim to standing is very much weaker than that of the appellant in *Southwestern Publishing Co.* v. *Federal Communications Commission*, 243 F. 2d [illegible]9, where the Court below, while criticizing the Commission for its failure to consider a change in the qualification of a permittee, held that the parent company of a licensee faced with financial injury had no standing to appeal because "the merely derivative interest it has in its subsidiary's injury does not satisfy the standard" of Section 402(b)(6).

Petitioner attempts to relate the issue of standing to the claim that an important issue is raised under Section 310(b). It does so by the contention (pp. 26, 28) that it was the only possible protestant against the Commission's action, so that the effect of the decision is to render that action unreviewable "at the instance of anyone". In the first place, petitioner wholly ignores the fact that the Commission, on its own motion, considered the public interest issue which petitioner sought to raise (R. 12213-12214). Secondly, petitioner's claim that it was uniquely qualified to seek review is shown to be fallacious by the very cases on which it relies. There are other broadcasters in the St. Louis market who might well have had a sufficient interest to protest. *Cf. Camden Radio, Inc.* v. *Federal Communications Commission*, 220 F. 2d 191. Petitioner cites *Clarksburg Publishing Co.* v. *Federal Communications Commission*, 225 F. 2d 511, in which a newspaper publisher was held to have standing to protest Commission action. No weight whatever can be given to petitioner's effort to portray itself as the only possible champion of the public interest.

III.

In summary, the question as to the role of the Commission under Section 310(b), on which petitioner seeks review, was not decided below and cannot be considered here; and on the only issue that was decided, the decision below is plainly right and no ground has been shown for an exercise of this Court's discretionary power of review.

Petitioner advances, however, as a reason for granting certiorari, the claim that the case may have a bearing on proposed legislation. Petitioner states (p. 28) that before

considering the need for new legislation, "Congress may desire a decision by this Court or may desire that this Court shall have declined to review the case by denial of this petition". This patently irrelevant consideration is followed by reference to certain testimony given before the Special Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce. That testimony, which was given after this case was argued and before it was decided in the Court below, related to certain conversations with members of the Commission prior to the original grant of the construction permit.

Petitioner has referred to the same testimony in proceedings relating to the Channel 11 permit which are still pending before the Commission. In pleadings there filed, CBS has answered in detail the charges which petitioner has attempted to build on that testimony. If any inquiry is called for, it can and will take place in a proper administrative proceeding.

Because the only issue here is that of petitioner's standing to protest the transfer, this case differs entirely from those (No. 235, *Sangamon Valley Television Corp.* v. *U. S.*; No. 242, *WIRL Television Corp.* v. *U. S.*; No. 349, *WORZ, Inc.* v. *Federal Communications Commission*) in which this Court, by reason of testimony before the same Subcommittee, has vacated judgments of the Court below. In each of those cases, the petition for certiorari sought to bring before this Court for review the very decision as to which allegedly improper representations had been made to members of the Commission. In the present petition, there is no effort to relate the testimony before the Subcommittee to the transfer proceeding or to the issue of petitioner's standing before the Commission and the Court below. Petitioner's reference to the Subcommittee testimony is as

out of place as is its suggestion that this Court should undertake to advise Congress on new legislation.

* * *

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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Attorneys for Respondent Columbia Broadcasting System, Inc.

October, 1958.

APPENDIX

The relevant provisions of the Communications Act of 1934 (47 U. S. C. Sec. 151, *et seq.*) are as follows:

Section 309(c):

> When any instrument of authorization is granted by the Commission without a hearing as provided in subsection (a) of this section, such grant shall remain subject to protest as hereinafter provided for a period of thirty days. During such thirty-day period any party in interest may file a protest under oath directed to such grant and request a hearing on said application so granted. Any protest so filed shall be served on the grantee, shall contain such allegations of fact as will show the protestant to be a party in interest, and shall specify with particularity the facts relied upon by the protestant as showing that the grant was improperly made or would otherwise not be in the public interest. The Commission shall, within thirty days of the filing of the protest, render a decision making findings as to the sufficiency of the protest in meeting the above requirements; and, where it so finds, shall designate the application for hearing upon issues relating to all matters specified in the protest as grounds for setting aside the grant, except with respect to such matters as to which the Commission, after affording protestants an opportunity for oral argument, finds, for reasons set forth in the decision, that, even if the facts alleged were to be proven, no grounds for setting aside the grant are presented. The Commission may in such decision redraft the issues urged by the protestant in accordance with the facts or substantive matter alleged in the protest, and may also specify in such decision that the application be set for hearing upon such further issues as it may prescribe, as well as whether it is adopting as its own any of the issues resulting from the matters specified in the protest. In any hearing sub-

sequently held upon such application issues specified by the Commission upon its own initiative or adopted by it shall be tried in the same manner provided in subsection (b) of this section, but with respect to issues resulting from facts set forth in the protest and not adopted or specified by the Commission, on its own motion, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the protestant. The hearing and determination of cases arising under this subsection shall be expedited by the Commission and pending hearing and decision the effective date of the Commission's action to which protest is made shall be postponed to the effective date of the Commission's decision after hearing, unless the authorization involved is necessary to the maintenance or conduct of an existing service, or unless the Commission affirmatively finds for reasons set forth in the decision that the public interest requires that the grant remain in effect, in which event the Commissioner shall authorize the applicant to utilize the facilities or authorization in question pending the Commission's decision after hearing.

Section 402(b):

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1)-(4) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.